83-1112

No. ..-....

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

CATARINO MURILLO,

Defendant and Appellant.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

The issues raised by this appeal relate solely to 5 narcotics convictions of appellant, Catarino Murillo. No issue is raised relating to the appellant's convictions for 3 counts of income tax evasion. (Superceding Indictment Counts 6, 7, and 8 (26 U.S.C. 7201)).

Appellant contends he was denied a fair trial on the 5 narcotics counts which included 3 counts of possession of heroin with intent to distribute, one count of continuing criminal enterprise, and one count of conspiracy to possess and distribute heroin. At the commencement of the trial, 29 overt acts were alleged. Appellant contends he was denied his Fifth Amendment right to a fair trial on the following grounds:

I. The cumulative effect of various errors relating to the trial of the narcotics counts including the delay; deportation of numerous material witnesses; destruction of physical evidence; erroneous or misleading advice to the jury; permitting the jury to hear inadmissible evidence and reference to stricken allegations, the failure to advise the jury of the striking of counts or to explain the absence of co-defendants, etc. combined, resulted in an unfair trial and requires reversal.

II. Pre-indictment delay prejudiced appellant's ability to prepare and present a defense.

III. Government's deportation of alleged participants in the crimes and alleges eyewitnesses to the crimes charged deprived appellant of a fair trial.

   A. It deprived appellant of the opportunity to present exculpatory witnesses.

   B. It deprived appellant of the right to meaningfully cross-examine the Government's witnesses who testified to events in which the deported witnesses (allegedly) took part.

IV. Destruction of all the contraband narcotics specifically referred to in the indictment by Federal agents before defendant's opportunity to analyze deprived appellant of a fair trial.

V. Under the peculiar facts of this case the failure to grant a mistrial after certain events deprived appellant of a fair trial, to wit:

A. After appellant's co-defendant (wife pled guilty mid-trial, and the jury was made aware of the fact,

B. After the court ruled numerous items of prejudicial and incriminating evidence inadmissible, which had already been presented to the jury;

C. After the Court struck certain alleged overt acts concerning evidence which had already been presented and to which reference was made in the Government's opening statement;

D. After the trial Court advised the jury in an erroneous and/or misleading manner over objection regarding the jurors' use of alleged co-conspirators' statements;

E. Where the Court refused to hold a hearing outside the jury's presence to determine preliminarily whether such alleged co-conspirators' statements were admissible; and, refused to order a Bill of Particulars on the charge of continuing criminal enterprises, although the indictment was framed in the statutory language. Appellant alleged before trial that the conspiracy count incorporated in the continuing criminal enterprise count was in fact the duplicator's charging of several unrelated conspiracies.

VI. Illegally obtained evidence should have been suppressed.

List of Parties to Proceedings Below.

APPELLANT, CATARINO MURILLO, hereby certifies that pursuant to Rule 15.1(b) of the Rules of the Supreme Court of the United States that the interested parties to this appeal are as follows:

1. ANTONIO VIZCARRA (legal title holder to property located at 1371 Popenoe Road, La Habra Heights, California, subject matter of the United States Government's Cross-Appeal).

2. SANDRA A. MURILLO, ELIZABETH MURILLO, and GRISELDA MURILLO, minors (Intervenors in the Cross-Appeal of the United States Government, and Plaintiffs in the United States District Court, Central District of California, No. 82-5304 and 82-0288, respectively).

4. Commissioner of INTERNAL REVENUE (Defendant United States Tax Court Docket #23175-81).

DATED: October 25, 1983.

ROGER AGAJANIAN,
Attorney for Appellant.

TABLE OF CONTENTS

Page

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Constitution

Page

Rules

Statutes

No. ..-....

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PETITION FOR WRIT OF CERTIORARI.

REFERENCE TO COURT OPINIONS.

APPELLANT, CATARINO MURILLO respectfully requests that this Court's attention be directed to the opinion rendered in Case #81-1727 *United States of America v. Catarino Murillo* by the United States Court of Appeals, Ninth Circuit (Appendix 1), Case #82-1043 *United States of America v. Catarino Murillo*, a cross-appeal by the United States Government (Appendix 2), Case #82-5304 *Antonio Vizcarra v. United States* and Catarino Murillo Intervenor in the cross-appeal of United States (Appendix 1) and Case #82-0288 Sandra A. Murillo, Elizabeth Murillo and Griselda Murillo, Minors and Intervenors in the Cross-Appeal of the United States Government (Appendix 1).

Intervenors, Antonio Vizcarra, Sandra Murillo, Elizabeth Murillo, and Griselda Murillo assert that their respective pieces of real property belonging to them were forfeited and seized by the United States Government in a criminal case

United States v. Catarino Murillo #81-1727 in which they were not charged nor a party to the action. Their property was taken without an opportunity to appear, present evidence, confront and cross-examine their accusers, thus depriving them of a right to a fair trial and their property without Due Process of Law.

REFERENCE TO JURISDICTION.

Nature of the Proceeding (pursuant to United States Supreme Court Rule 15(e)(i)). This is an appeal by way of Petition for Writ of Certiorari from affirmance of a conviction by the United States Court of Appeals, Ninth Circuit on July 6, 1983 and a resulting denial on Rehearing on August 29, 1983.

Date of Entry of Judgment (Rule 15(e)(ii)):

1. District Court, Central District of California January 25, 1982.
2. United States Court of Appeals, Ninth Circuit Opinion.
3. United States Court of Appeals, Ninth Circuit on Rehearing August 29, 1983.
4. Notice of Appeal was filed on September 28, 1983.

Statutory Provision Conferring Jurisdiction (Rule 15(e)(iii)):

UNITED STATES CONSTITUTION — FIFTH AMENDMENT;

UNITED STATES CONSTITUTION — SIXTH AMENDMENT;

UNITED STATES CONSTITUTION — FOURTEENTH AMENDMENT.

REFERENCE TO RELATED CONSTITUTIONAL PROVISIONS AND STATUTES.

United States Constitution Fifth Amendment.
United States Constitution Sixth Amendment.
United States Constitution Fourteenth Amendment.

United States Code Title 18 Sec. 2314.
United States Code Title 21 Sec. 841(a)(1).
United States Code Title 21 Sec. 843.
United States Code Title 26 Sec. 7201.
Federal Rules of Civil Procedure Rule 7(f).
Federal Rules of Evidence Rule 801(d)(e).

STATEMENT OF THE CASE.

Procedural Facts.

Appellant, CATARINO MURILLO was charged by indictment filed on March 8, 1981 with nine counts, alleged to have occurred between March 7, 1975 and May 9, 1980. Four counts were for violating 21 U.S.C. §841(a)(1) (distributing heroin) on March 14, 1975, and in three months in 1977. (Indictment Counts 2, 3, 4 and 5). Count I alleged a wide ranging conspiracy with 29 overt acts, 8 indicted co-conspirators, 7 named unindicted co-conspirators and two illegal objects, to possess and distribute heroin. Count 6 alleged a violation of 21 U.S.C. §848 (continuing criminal enterprise). The remaining income tax evasion in violation of 26 U.S.C. 7201 and are not disputed in this appeal. (Appendix 1-16) (ER 1-16)

Only appellant was named in all counts. His wife, JOSEFA BELTRAN MURILLO was named as a co-conspirator in Count I and as a co-defendant in the income tax counts. No other defendant was named in any other County except: the other alleged co-conspirators in Count I and GASPAR AVENDANO MURILLO whom appellant was accused of aiding and abetting in Count II (distributing 258 grams of heroin).

Counsel filed fifty separate motions before and during trial. Those which relate to the issues raised on appeal are summarized here along with other procedural facts relevant to those issues. Reference are to pages of the clerk's transcript.

Appellant MURILLO was arraigned on April 13, 1981 and his trial was set for June 16, 1981. (C/T 3) (Appendix 17)

On June 8, 1981 appellant filed: a Motion to Dismiss the Conspiracy Charge (Count I) for "Prejudicial Joinder of Unrelated Alleged Conspiracies"; a Motion to Dismiss the Continuing Criminal Enterprise Charge (Count 6) as vague, or in the alternative for a Bill of Particulars. (C/T 4) Both motions were denied. (C/T 6-7) (ER 32-40)

A Motion to Dismiss the Indictment for Prejudicial Pre-indictment Delay was made on June 11, 1981, denied, reviewed on October 2, 1981, and again denied on October 6, 1981. (C/T 5, 14) (ER 41-80)

On June 11, 1981 appellant moved for pre-trial disclosure of independent evidence of the conspiracy alleged in Count I. (C/T 5) (ER 128-171)

On July 8, 1981, the Government Filed a First Superceding Indictment which was identical to the Indictment previously filed *but* that Count II was deleted since it was barred by the statute of limitations and Counts 3-9 were renumbered Counts 2-8. (C/T 7) (Appendix 18-33) (ER 17-27)

On August 27, 1981 appellant filed a Motion to Strike Certain Overt Acts: 1,2,20,25. (Appendix 33-41) (ER 172-180)

The motion was denied on September 8, 1981. (C/T 9, 11)

On August 31, 1981 appellant moved to dismiss Counts 1, 3, 4 and 5 of the Indictment for denial of due process under the decision in *U.S. v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971). (C/T 9-11) (ER 181-241)

On September 15, 1981 the jury trial of appellant and his wife on Counts 1-8 of the First Superceding Indictment commenced. (C/T 12)

On September 18, 1981 appellant's wife plea-bargained out of the case for probation and no fine. (R/T 542-551) (Appendix 42)

On September 22, 1981 appellant moved for a mistrial on the grounds that the Asst. U.S. Attorney referred to MRS. MURILLO's plea bargain in front of the jury. The Court admonished the prosecutor and denied the motion. (C/T 12-13; R/T 688-695) (Appendix 44-51)

On September 23, 1981 the Court denied defendant's motion to dismiss for failure of Government to preserve information relative to an informant, but instead struck 80 pages of reporter's transcripts from the testimony of Government's witnesses NAVA and MARTIN retarding a conversation with (alleged) co-conspirator GASPAR AVENDANO MURILLO (R/T 836-837) (C/T 13)

On September 24, 1981 appellant moved to dismiss the indictment and strike Government witnesses testimony on the grounds the government's affidavit falsely asserted that witness (MEZA, SIMON) was out of country from 1978 until 1981 DEA was meeting with and paying the witness in 1978, 1979 and 1980. (R/T 1078-1083; C/T 13) (Appendix 52-57)

On October 2, 1981 appellant moved to dismiss on due process grounds per *U.S. v. Mendez-Rodriguez, supra* and prosecutorial misconduct. On October 5, 1981 the motions were denied. (C/T 14) (ER 242-258)

On October 6, 1981 the Court denied eleven separate motions for dismissal, and a motion for a mistrial. (C/T 14-15)

On October 9, 1981 the Court denied appellant's final motion for mistrial relating to the government's contacts with their witness *SIMON MEZA*. (C/T 15) (Appendix 58-63)

After 16 days of trial, on October 14, 1981 appellant was found guilty on all counts 1-8 in the Indictment.

He was sentenced to five (5) years on each of Counts 2, 3, and 4 (consecutive) and two (2) years (conclusive) on a tax count (Count 6). His sentences (of 10 years) on Count 5 and (2 years each) on Counts 7 and 8 were made concurrent and no sentence was pronounced on Count 1 the conspiracy count included in Count 5 (continuing criminal enterprise). He was at that time remanded to the custody of the U.S. Marshall without bail. (Appendix 64) (ER 28)

STATEMENT OF FACTS.

Overt Acts 1 and 2 involved a negotiation for the sale of 30 to 40 ounces of heroin. Involved in this were Imperial County Sheriff *Jose Moreno-Nava, Gaspar Avendano Murillo* (who was unavailable at trial), and *Miguel Borbolla*, the informant also unavailable, whereabouts unknown, DEA unable to locate him, last known address Mexicali, B.C. During trial it was determined that *Borbolla* had been available since the above-mentioned negotiations in March 1975 until April 1980. The Court then granted a Motion to Strike Overt Acts 1 and 2 but only after the jury had heard approximately 200 pages of testimony from four witnesses. (R/T 199-390)

With respect to Overt Acts 22 and 23, *Catalino Nunez* stated that he is a paid informer on an irregular basis for the DEA He averages between $15,000 to $20,000 per year as an informant. He stated that he met *Jose Campos* in the Sinaloa Bar in Los Angeles on July 8, 1978. At side bench, it was determined that *Jose Campos* was unavailable due to deportation. The Court dismissed these Overt Acts after hearing 6 pages of testimony. (R/T 470-476)

Overt Act 26 involved the seizure of a cashier's check for $85,000 payable to *Gil Schwartzberg Esq.*, and $7,000 cash on *Josefa Murillo* and $2,400 cash on her husband, *Catarino Murillo* at the Tijuana border on May 9, 1980. (R/T 643-645, 654-674)

Overt Act 5 involved the testimony of *Ramon Ochoa* who testified to heroin transactions in *Catarino Murillo's* bar in Gardena, California during "maybe June or July 1976." Present was *Arcenio Beltran* unavailable due to deportation. (R/T 760-771)

Overt Act 9 involved the same parties as Overt Act 5 having occurred in September 1976. (R/T 772-773) Overt Act 10 occurred "like around the last days of '76". (R/T 774-783)

Overt Act 14 involved transactions during the last 4 or 5 months of 1976. (R/T 784-787)

Overt Act 11 involved *Ochoa's* arrest on March 9, 1977 in Los Angeles, wherein *Ochoa* possess $1,700 cash which he said he was to give to *Catarino Murillo*. (R/T 788-801)

The defense contended that cross-examination of *Ochoa* was restricted because, although there were listed approximately 50 instances of impeachment, the Court replied, "We are not going into 50 instances, I can assure you . . . cut them down to 3." (R/T 844-847) On cross-examination *Ochoa* was impeached as to when he entered this country (R/T 844); how many times he went to get heroin from *Catarino Murillo* (one time) (RT 840); how many times he was at the bar (one time). (R/T 843-844) (Appellant contends that unavailable percipient witnesses would have aided in impeachment of Government witnesses if not restricted.)

Overt Acts 7 and 8 involve the testimony of *Simon Meza*. During trial, the Court was informed that the percipient witness *Guadulupe Meza* and Government's witness *Simon*

Meza, was in fact released from prison in August 1980 and deported. The D.E.A. declaration stated that *Simon Meza* was out of the country and unavailable from 1978 to 1981 and thus the Government could not proceed until 1981 with the *Murillo* indictment. *Simon Meza* testified at trial that he was in the United States in 1978, 1979, 1980 and 1981 giving information to the D.E.A. There were D.E.A. payment slips during 1978, 1979, and 1981. The Court denied the Motion to Strike the testimony of *Simon Meza*. (R/T 947-1083) The Court inquired as follows:

> "Let me ask you another question, and I am not sure I should ask this, but suppose the Court concludes that the Government because of the lack of full information to the defendants at the time with respect to the presence of *Simon* and *Guadalupe*, suppose that the Government concludes that the narcotics aspect of the case must be dismissed, what does that do to your tax fraud case?" (R/T 1821)

DISCUSSION

I.

The Combination of Errors and Events Resulted in an Unfair Trial and Requires Reversal.

Appellant is not here requesting a reversal because his trial was imperfect. He does not claim a right to a perfect or "error-free" trial. Nor has appellant invited this Court's attention to all or even most of the advise developments in the trial court which arguably constituted error.

What appellant seeks and what the law requires is that a conviction be invalidated when it is apparent from the record that multiple errors or developments at trial may well, in combination, have resulted in a miscarriage of justice or may well have induced a verdict less favorable to an accused than would be likely in the absence of those errors.

There is no mathematical formula known to appellant's counsel for evaluating the precise point that error becomes prejudicial. No scales can weigh according to measurable standard the precise value our law ascribes to the term "reversible." How then can appellate courts know in cases such as this one, where errors or the denial of important rights are apparent, when they have reached the magnitude that requires the extraordinary measure of reversal?

Appellant submits that there are at least two satisfactory answers. One is that an error is reversible when the aggrieved party demonstrates that *that* error harmed his chances in a way that substantially impacted on the result to be reversed. Appellant contends that several such reversible errors (argued in the other parts of this brief) occurred in this case. But whether or not this court agrees, there is another reason this case calls out for reversal.

Considering the entire record and the extraordinary number of events depicted in it which may have prejudiced

appellant and considering the cumulative impact of several of the most egregious, the Court should reverse because combined the many errors in this case nearly guarantees that appellant did not receive a fair trial.

Appellant requests this Court to consider each assignment of error or prejudice included in all parts of the argument in this opening brief, but invites the Court's attention especially to the following three:

1. The lengthy delay between 1977, when the DEA first targeted Mr. Murillo for investigation and 1981 when he was indicted for counts which allegedly occurred one to six years before. (ER 41-80, 81-127) The certain result of the delay was to deprive the fact finder (and both litigants) of many potential witnesses. It is at least plausible to conclude that some of them would have been helpful to the defense case. Another certain result was that all memories were less good, though this hurt the defense most because the prosecution had the benefit of written reports to help refresh prosecution memories.

2. The failure of the government to maintain (or disclose) adequate information to enable appellant to locate and interview one or more key witnesses. (See R/T 825-837) The negligently (or other) false information from the government was not limited to informants who were lost, it extended to witnesses that the government itself deported. (*E.g.*, it was first said Guadalupe Meza was deported in 1978 before his value to the defense was reasonably apparent. Later it turned out that he was deported in August, 1980. See Mendez-Rodriguez argument, *infra*. (R/T 1810))

3. At least seven potential defense witnesses were deported. It is clear that many people known (or of whom the DEA is chargeable to have known) to have firsthand information relating to the truth of the charges against appellant

were deported. Regardless of how this is viewed from a legal rubric point of view (*i.e.*, as prejudice flowing from delay or as denial of the right to defend, confront, and cross-examine) in human terms it is unfair.

The trial Court itself recognized that by a combination of three factors — negligent delay, non-diligent informant handling (or dishonest informant disclosures), and witness deportation — a serious threat to appellant's right to a fair trial existed. (R/T 1816-1821)

> "THE COURT: Let me ask you another question, and I am not sure that I should ask this, but suppose the Court concludes that the Government, because of the lack of full information to the defendants at the time with respect to the presence of Simon and Guadalupe, suppose the Government concludes that the narcotics aspect of the case must be dismissed, what does that do to your tax fraud case?" (R/T 1821)

Laudable as the goal of salvaging the tax fraud prosecution may have been, it did not justify the Court's ultimate ruling. Ironically, appellant does not even contest the tax convictions or sentence, but is still pressing the issue of the fairness of the narcotics trial.

The government's response below was essentially the position they are expected to take here — the errors affect only a small divisible part of the case and are, in any event, harmless.

Surely they will claim the destruction of the heroin itself was harmless and, no doubt, if that were the only thing appellant was deprived of, a Court might conclude its good faith intentional destruction was "harmless."

But to suggest that each error can be contained to its own segment of the case, "compartmentalized" as it were, ignores the reality of attempting to defend a conspiracy count.

It is the essence of the prosecution's theory that the acts and events are all so closely related that they collectively make up the conspiracy and continuing enterpriser counts. The trial Court consistently ratified the government's position that taking all the circumstances together they made a conspiracy of which appellant was an important member.

For that reason, each error affected the entire case. Each error that affected the strength of the inference of guilt on one count or one overt act strengthened the entire government's narcotics case.

This Circuit has recognized that a cumulation of errors can require reversal whether or not any one error is, standing alone, prejudicial.

In *U.S. v. Ortega* (9th Cir. 1977) 561 F.2d 803, the conviction was reversed due to the cumulation of two errors: (1) allowing the defendant to be impeached with a misdemeanor (petty theft prior); and (2) restricting his right to impeach a government witness with a felony. Specifically not reaching the question of whether the restriction or impeachment reached constitutional dimension or caused prejudice, the Court found that the "combined errors were prejudicial." (See also *U.S. v. Moors* (D.C. Cir. 1977) 435 F.2d 113.)

The case most similar to the present case is *U.S. v. McLister* (9th Cir. 1979) 608 F.2d 785 where this Court reversed a conviction for distributing cocaine were: where restriction of cross-examination was found to be only "possibly prejudicial" (608 F.2d 785 at 789 fn.3); an erroneous instruction on a minor fact issue, and an erroneously admitted prior misdemeanor marijuana conviction of the defendant.

Saying that each error was harmless standing alone, this Court reversed because of the combination.

"The combination of other errors requires reversal even though each by itself might constitute harmless error . . ." (608 F.2d at 789. (See also *Government of Virgin Islands v. Colino* (1980) 631 F.2d 226, 230.))

Appellant contends that here the combination of errors is at least as likely to be prejudicial. Here, as in the above, authority errors involving the right of cross-examination are involved (*e.g.*, deportation of potential sources of cross-examining information). Here too, the government may claim that prejudice is speculative or the error harmless. While appellant concedes that a restriction of cross-examination has been held harmless by this circuit (*U.S. v. Price* (9th Cir. 1978) 577 F.2d 1356), such error has also been ruled prejudicial per se. (*Prapavat v. Immigration and Naturalization Service* (9th Cir. 1980) 638 F.2d 84, 87.)

Appellant believes the record here shows prejudice from each error but concludes that under the rationale of *McLister, supra*, the narcotics convictions must be reversed even if each error standing alone is viewed as harmless.

II.

Non-Diligent Pre-Indictment Delay Prejudiced Appellant's Right to a Fair Trial.

Appellant brought two written motions to dismiss based on Pre-Indictment delay. (ER 41-80, 81-127)

At the first hearing, the government justified the delay (of approximately 6 years between the date of the earliest overt act alleged (No. 1 on March 7, 1975) and the date the indictment was filed (April 8, 1981) (C/T 3) by arguing that the investigation was ongoing, and by asserting that a key government witness was unavailable to the DEA between 1977 when the Murillo investigation was officially opened and March 1981. (See Appendix 66-68, Exhibit B to appellant's Motion to Dismiss.) As the testimony at the

trial later revealed, that witness Simon Meza was in the United States in 1978, 1979, 1980 and 1981, had received DEA payments 1978 and 1979. (R/T 944-1083 esp. 1078-1083) At the first "delay" hearing the trial Court found that the government had a basis to indict in 1979. But at that time they claimed Meza's unavailability. (Appendix 66-67) (6-22-81 R/T 7)

Similar claims were made regarding the source(s) of other evidence deemed needed for the prosecution. In response appellant submitted a detailed analysis of *what evidence* related to each count and overt act and *what date* the government first received or learned of it and whether the government had control of the witness or evidence involved. The government's documents presented to the District Court established that no new witnesses in the case were discovered after 1979 and that all the witnesses had been DEA informants before then. (See Appendix 66-68, 151-155) The primary reason for the delay in addition to the unavailability of key witnesses was that the government agents were re-examining reports and statements of informants and paid government witnesses which were already in the government's hands. A transferred agent resulted in the slowness of the investigation between 1977 and 1979. (Appendix 66)

Appellant contends that the record herein fails to show any diligent effort on the part of the government to prosecute this matter in a reasonably prompt or diligent manner. While no sinister motive for the delay has been shown, the government's actions in either failing to recognize or failing to care that it was in a position to indict its 1977 DEA target can only be characterized as negligent. Its apparently false statement that the informant Simon Meza, was unavailable from 1978-1981 when the DEA was using the witness as a paid informant in the United States during that very period is either a lie or an assertion so negligently made that it

approaches recklessness. (R/T 1076; 1078-1083) (Appendix 58-63)

Appellant contends that the lapse of time in this case, under these circumstances is sufficient to require an inquiry into the due process delay issue intimated in *U.S. v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). There the Court suggested that in some circumstances when prejudice results from pre-accusation delay, due process would require a dismissal. (*Supra* at 324, 92 S.Ct. at 465) More recently, the Supreme Court had indicated that cases when the delay results in prejudice are rare enough that it is still too soon for that Court to distill general guidelines for applying the due process clause to pre-accusation delay. As such, the Court has encouraged other Courts to work out rules for adjudicating such claims.

> "In *Marion* we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions. 404 U.S. at 324, 92 S.Ct. at 465. More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay. We thgerefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases." (fn. om.) *U.S. v. Lovasco*, 431 U.S. 783, 52 L.Ed.2d 752, 97 S.Ct. 2044.

The two circuits that have met the challenge of *Lovasco* have essentially engrafted a modification of four-pronged balancing test of *Barber v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) used to evaluate 6th Amendment speedy trial delay. In *U.S. v. Barket*, 530 F.2d 189

(8th Cir. 1976) and *U.S. v. Mays*, 549 F.2d 670 (9th Circuit, 1977) the Courts considered (1) prejudice to the defendant's case (2) the length of the delay and (3) the reason for it. Where the accused is yet uncharged the fourth *Barber* factor — his assertion of his speedy trial rights — can have no application.

This Court wrote in *U.S. v. Mays, supra:*

> "We reject both the absolute position argued by the appellant (that there must be both actual prejudice and improper intentional delay) and that urged by appellees (that actual prejudice due to preindictment delay is enough). We prefer an approach which balances the factors in the individual situation. . . .
>
> "First of all, there must be some demonstration of actual prejudice resulting from the delay. Such prejudice will inevitably be either the loss of witnesses and/or physical evidence or the impairment of their use, e.g., dimming of the witness' memory. The burden of presenting such prejudice is on the defendant. (Citations omitted.) To establish actual prejudice sufficient to warrant a dismissal, the defendant must show not only the loss of the witness and/or evidence but also must demonstrate how that loss is prejudicial to him. (Footnote omitted.) *Marion, supra*, 404 U.S. at 326, 92 S.Ct. 455; *U.S. v. McGough*, 519 F.2d 598, 604 (5th Cir. 1975) . . .
>
> "A second element to be considered is the length of the delay. This aspect, however, must be weighed in conjunction with the third element — the reason for the delay . . ."

Of course, the most common form of prejudice to defendants resulting from delay is the unavailability of key witnesses. See, *e.g., Dickey v. Florida*, 398 U.S. 533, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970); *U.S. v. Macino*, 486 F.2d 750 (7th Cir. 1973) and *Stuart v. Craven*, 456 F.2d 913, 916 (9th Cir. 1972).

In this case, the record amply demonstrates the loss of numerous key witnesses and the fading of the memory of at least one key identification witness who was available to appear.

Illustrations of the prejudice in this case suffered are found in the examples of the missing witnesses referred to in trial testimony as eyewitnesses or participants in the alleged criminal activity, *e.g.*, Miguel Borbolla (referred to as participant in transaction referred to in Count II and Overt Acts 1 and 2 (R/T 199-278), Guadalupe Meza (referred to as eyewitness to and or participant in alleged 5 kilo transaction alleged as Count 3 (First Superceding Indictment) and Overt Act 8. (R/T 950-958, 969, 1084-1088) Both witnesses had been deported after the government's investigation of appellant. (Appendix 156-158)

A third witness' memory (Juan Castro) was extremely impaired by the lapse of time between his seeing a transaction (in a bar in August 1976) and his grand jury testimony (nearly four years later) when he could not recall what the man he was to testify against looked like. (C/T 10, 9/2/82) (R/T 628-636) (Appendix 127) (ER 339-385)

In addition, all the witnesses which were deported were lost to appellant before they could be interviewed. (Appendix 156-158) Under the rationale of *Mays, supra*, appellant contends that the prejudice apparent in this record is the kind requiring a due process dismissal. But this case has unique features which deserve particular attention when evaluating the result of the delay.

Marion, supra, 404 U.S. 307 is reluctant to require dismissal of charges for pre-indictment delay because the same general purposes of the due process rationale are already protected by the statute of limitations.

Applying this reasoning to the present case, it it clear that appellant should be presumed to be prejudiced at least as to those overt acts and of evidence received which relate to events beyond the statute of limitations. (Overt Acts 1 and 2 1975) Because appellant was accused in Count 5 (First Superceding Indictment) with a continuing crime and in Count I with the necessarily included conspiracy, the government was permitted to prove events which, as substantive courts, were barred by the statutes of limitation. *E.g.*, while Count 2 was dismissed as outside the statute, Overt Act 1 alleged to have occurred one week earlier was not barred, nor was evidence of the superceded Count 2 as an Overt Act. Overt Acts 3, 4, 5, 6 and 7 were as close to being five years before the indictment that it is unrealistic to suggest that the passage of this had not harmed the integrity of the of the evidence involved, the memories of witnesses or cast doubts on the integrity of any factual conclusions of a judicial proceeding. Much of this case was at or near the age which triggers the statute of limitations. The defendant was demonstrably prejudiced by the loss of material wintesses, the fading of memories, and the destruction of all the physical evidence. (Appendix 156, 18-32) The Court found that the defendant was prejudiced by the loss (by deportation) of witness Jose Campos in January of 1981 (R/T 478-479) and of Miguel Borbolla (R/T 385-391 and 825-837).

In *U.S. v. Barket*, 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917, 97 S.Ct. 308 (1976), the Court of Appeals for the Eighth Circuit dismissed an indictment where there had been a delay of almost four years between the time of the act charged (misapplication of bank funds) and the time of the indictment. In so holding, the Court first concluded that knowledge of the transactions in question, possessed by the National Bank Examiner and the Department of Justice in Washington approximately three and one-half years

prior to the Indictment, "should in fairness be imputed as well to the local United States Attorney in assessing Barket's claim that he was denied due process, and that Barket had shown sufficient delay caused prejudice to his defense."

The Court in the case at bar made reference to this in its ruling striking Overt Acts 22 and 23 due to the unavailability of Jose Campos when it said, "Well, is it the Government's contention that it's a matter of the right hand not knowing what the left hand is doing? (R/T 479-480) . . . I make no personal critcism of you, Ms. Gonzales, but the Government was responsible for deporting a man who was a percipient witness." (R/T 487) Upon review of the evidence, the Court further held:

> "After a careful review of the record, briefs and arguments of the parties we believe the instant case . . . presents a unique showing of prejudice sufficient in the circumstances to require a dismissal of the indictment. The passage of time, for which Barket was not responsible, was considerably long (47 months) than that in any other of our decisions failing to find prejudice; and the District Court's finding of prejudice is not subject to reversal by us unless it is clearly erroneous. Six witnesses who, Barket claims, would have materially aided his defense died before the case could have come to trial . . . Moreover, as the District Court found, many other witnesses who are still alive and able to testify for Barket had, in the District Court's words, 'extreme and understandable difficulty remembering' relevant facts. The loss of these witnesses undoubtedly impaired Barket's ability to defend himself . . .
>
> "As the District Court held, however, the prejudice to Barket's defense caused by the 47 month period between the transaction and the indictment was severe. Witnesses who might have been able to demonstrate

> that the transaction was in fact intended as a bona fide loan or to disprove the alleged political contribution aspect of the loan transaction are now dead or unable to recall circumstances that existed five years ago. In any event, the Government must bear the burden of demonstrating that the missing witnesses did not possess exculpatory evidence, U.S. v. Norton, 504 F.2d 342 (8th Cir. 1974), cert. denied, 419 U.S. 1113, 95 S.Ct. 790, 42 L.Ed.2d 811 (1975). This it has not done." 530 F.2d 189, 193, 196 (emphasis added).

As demonstrated above, the prejudice caused to defendants by the pre-indictment delay herein is of a greater magnitude than that found in Barket. Whereas the Court in Barket found that "witnesses who might have been able to demonstrate that the transaction was (bone fide) are now dead or unable to recall circumstances" due to the 47 month delay (530 F.2d 189, 196) (emphasis added), most of the key witnesses in the present action are dead, deported, or have simply disappeared over the passage of time. The Court can readily imagine the insuperable task which the Government's delay has imposed upon the defense finding any witnesses who have not been placed beyond its reach by deportation. Without exception, each of the key, percipient witnesses to the transaction alleged in the indictment were either defendants themselves in the state prosecutions of these acts or were involved as informants. In circumstances such as these the Government's burden to proceed expeditiously or retain the ability to locate these witnesses is particularly heavy since these individuals are not the type that the defense can readily trace despite the passage of time. The Court should take into account that these percipient witnesses do not have the employment history, family ties and other indicia of a stable, law-abiding background which renders them easily found, interviewed, and subpoe-

naed by the defense. At best, all of the potential defense witnesses who could be located are in the impossible position of being forced to recall key events that occurred from between 12 and 72 months prior to the Indictment. It is difficult to imagine a case wherein the prejudice of a defendant is greater.

III.

Flagrant Violations of the Principles of U.S. v. Mendez-Rodriguez, 450 F.2d 1, Require Reversal.

Appellant contends that the record of this case shows indisputably that the trial judge, the Honorable William P. Gray undertook herculean efforts to afford a fair trial to the parties in the fact of overwhelming odds. Respectfully, appellant contends that in its efforts to do so, the trial Court failed because the "half-measures" undertaken (*i.e.*, the dismissal of various overt acts due to the deportation of key witnesses) failed to remedy the constitutional ailment caused by the deportation of the witnesses.

In these instances the trial Court found in due process violation but sought a less "drastic" remedy than the one required.

For example:

1. In dismissing Overt Acts 22 and 23 (R/T 488-489) the Court seems apologetic to the government. "I make no personal criticism of you, Ms. Gonzales, but the Government was responsible for deporting a man who was a percipient witness . . ." (R/T 487) (Appendix 159)
2. In striking the (already presented) testimony of agents Nava and Martin re a meeting in 1975 the Court said ". . . I'm not going to dismiss the prosecution. That would be far too drastic." etc. (R/T 836-837) He admonished the jury to disregard the testimony of

Deputy Nava (R/T 199-232) and Agent Martin (R/T 249-278) but made no reference to Agent Loveless. (R/T 234-248) (Appendix 160)

In ruling, the Court inquired of counsel:

"THE COURT: All right. What do you think that I ought to do?

"MR. MICHAELSON: I think you ought to dismiss the case because he's a percipient witness to this giant conspiracy.

"THE COURT: Well, I'm not going to do that. Short of that, what do you think I ought to do?" (Appendix 164)

In other instances the Court simply denied defense motions.

In all, appellant alleged that the following percipient/eye witnesses were deported to the prejudice of defense.

Jesus Beltran-Loya

(a) U.S. Attorney conceded he was deported in 1981. (R/T 6-22-81, 9) And that he was a potential defense witness now lost. (R/T 6-22-81, 9)

(b) Named in Indictment as unindicted conspirator.

(c) Named as actor in Overt Act No. 3.

Jose Campos

(a) Trial Court found he was (a very percipient witness to the whole transaction ". . . referred to in Overt Acts 23 and 24. (R/T 479-480)

(b) U.S. Attorney conceded he was deported in January 1981 after their witness Nunez testified to his participation in the acts alleged. (R/T 479-480)

Guadalupe Meza

(a) Present during the alleged possession for sale by appellant of 5 kilos of heroin (Count 3 of First Superceding Indictment, also alleged at Overt Act 2). (R/T 969-971)

(b) Per government witness Simon Meza the person:

(1) Had a conversation with appellant in 1965 regarding heroin. (R/T 947-949)

(2) Introduced appellant to Simon Meza in his (Guadalupe Meza's) home in 1965. (R/T 947-949)

(3) Lived with Simon Meza in 1976 in a house owned by appellant.

(4) Resided in the house in 1977 which was the place appellant allegedly possessed 3 kilos of heroin, displayed it, and discussed it. (R/T 955-958)

(c) Was arrested for possession of 1 kilo of heroin in May 1977 on information given to the DEA by Simon Meza (R/T 960-965)

(d) Originally government told the Court this witness was deported until August of 1980. (R/T 1845-1846)

(e) Simon Meza gave information to DEA regarding Guadalupe and appellant in 1977. (R/T 1880-1891)

(f) Appellant was first targeted for a DEA heroin distribution investigation in 1977.

(g) Ramon Ochoa testified regarding Guadalupe Meza to the Grand Jury in 1980 and 1981 both before and after he was deported in August 1980.

(h) At trial Ramon Ochoa said Guadalupe Meza was introduced to him in appellant's presence in 1978. (R/T 798-799)

(i) Named as an unindicted co-conspirator and as actor in Overt Act 15.

Miguel Beltran

(a) Per Simon Meza was present in 1977 when appellant displayed and discussed 5 kilos of heroin in Guadalupe Meza's presence. (R/T 969)

(b) Was deported in 1977.

(c) Was present at conversation between appellant and Simon Meza when appellant had no heroin.

(d) Appellant alleged he was defense witness on Overt Acts 7, 8, and 12.

Rafael Torres, Susan Padilla and Juan Torres

(a) Deported in 1977.

(b) Defendant alleged could impeach Simon Meza re Overt Act 12.

The loss of seven witnesses who had (allegedly) personal knowledge about specific counts or alleged overt acts is crippling enough to the defense of a criminal case. But the significance of the loss of these particular witnesses in this case is even greater.

Two witnesses, Ramon Ochoa Nevarez and Simon Meza were the essential or lynch-pin witnesses for the government's case against appellant. The entire case on all narcotics counts and overt acts on which appellant was convicted were entirely dependent upon the jury's evaluation of the credibility of these two witnesses.

Besides losing the directly exculpatory evidence on the allegations of which the deported defense witnesses had personal knowledge, appellant was deprived of two very important additional defense tools: (a) the ability to (more) effectively cross-examine these two essential government witnesses with information from interviews with the unavailable deportees, and (b) the opportunity to impeach or contradict these two with conflicting testimony on some crucial accusations including appellant's possession of 5 kilos of heroin and his (alleged) incruciating statements to the government's witnesses in the presence of the deportees. This much is apparent from the evidence presented and the concessions of the U.S. Attorney during the proceedings below. The lack of additional specific showing of the full extent of the prejudice to appellant and the exculpatory

evidence that was lost cannot be held against appellant because the District Court refused to permit an evidentiary hearing. (R/T 1848-1849 esp. 1848)

Appellant contends the deportation of these witnesses which resulted in the prejudice outlined above requires reversal for two reasons. (1) under the rationale of this circuit's decision in *U.S. v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971) and its progeny the District Court should have dismissed the 5 narcotic counts; (2) the loss of the seven witnesses listed above at the behest of governmental action requires reversal under the rationale of *Webb v. Texas*, 409 U.S. 95, 34 L.Ed.2d 330, 93 S.Ct. 351 (1972).

IV.

Destruction of Alleged Contraband Prejudiced Appellant.

Although the indictment refers to various quantities of heroin possessed by various people at various times, none was introduced at the trial.

Since here, the evidence was not inadvertently lost in good faith (*U.S. v. Augenblick* (1969) 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537) and since it was destroyed after the DEA was chargeable (under the rationale of *U.S. v. Barket, supra*, 530 F.2d 189) on due process grounds with knowledge of its relevance to the investigation of appellant. (*I.e.*, after the targeting of appellant for investigation in 1977) the destruction of the substance tested calls for suppression of the results of the test or analysis. (*U.S. v. Bryant, supra*, 439 F.2d 642-652; *U.S. v. Picariello*, 568 F.2d 222, 227)

Here the error in permitting the results into evidence is not harmless because the analysis results lended an aura of credibility to the Government's chief witnesses. Compare *Giglio v. U.S., supra*, 405 U.S. 150, 154 and *Brady v. Maryland, supra*, 373 U.S. 83, 87.

With respect to the case at bar, the Court admonished the jury as to why the heroin was not available at trial. (Statement of Facts 20, R/T 321) The jury also heard from Forensic Chemist McDermott that the heroin and cocaine samples had also been destroyed. (R/T 934, 944; Statement of Facts 41)

V.

Denial of a Mistrial for Cumulative Irremediable Error/ Events Requires Reversal.

Appellant contends that his motions for mistrial should have been granted because of a variety of procedural flaws.

A. Reference to co-defendant/wife's plea of guilty in the jury's presence. *Bruton v. U.S.* (1968) 391 U.S. 123, 88 S.Ct. 1620; 20 L.Ed.2d 476. Also, *Harrington v. California* (1969) 395 U.S. 250 "overwhelming exception rule."

B. The jury heard inadmissible evidence, requiring the jurors to engage in "mental gymnastics" to forget in excess of three hundred pages of testimony.

C. The jury considered material not admitted as evidence. *U.S. v. Bagley*, 641 F.2d 1235 (9th Cir. 1981).

D. Misleading jury instructions require reversal. Rule 801(d)(2)(E) Federal Rules of Evidence; *U.S. v. Peterson*, 549 F.2d 654, 658 (9th Cir. 1977); *U.S. v. Carbo*, 314 F.2d 718, 737 (9th Cir. 1963); *U.S. v. Spanos*, 462 F.2d 1012, 1014 (9th Cir. 1972); *U.S. v. James*, 590 F.2d 575, 579 (5th Cir. 1979); *Glasser v. U.S.*, 315 U.S. 60, 74.

E. Lack of pre-trial determination of the issues caused prejudice.

Respectfully submitted,

ROGER AGAJANIAN,

Attorney for Defendant and Appellant.

APPENDIX

APPENDIX 1.

Memorandum.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellant, vs. Catarino Murillo, Defendant-Appellee. CA No. 81-1727, No. 82-5304.

Filed: July 5, 1983.

Appeal from the United States District Court for the Central District of California.

Honorable William P. Gray, District Judge, Presiding.

Argued and Submitted January 3, 1983.

BEFORE: SKOPIL, NELSON and CANBY, Circuit Judges.

These are two of the three appeals arising out of the heroin distribution prosecution of Catarino Murillo. The third appeal, No. 82-1043, involving the district court's exemption of certain property from forfeiture pursuant to 21 U.S.C. § 848 (1976), was addressed separately in a published opinion. Here we deal with the appeal of Murillo's minor children from the district court's denial of their motion to intervene in the criminal case pending against their father. In addition, we address the numerous grounds urged for the reversal of Murillo's conviction. We affirm.

INTERVENTION, 82-5304.

The only authority cited in support of the children's motion to intervene is Rule 24(a) of the Federal Rules of Civil Procedure. Appellants contend they are asserting an interest in property which is the subject of the action and that they are so situated that as a practical matter the disposition of this action may impair their ability to protect that interest.

The simple answer to their contention is that Rule 24(a) applies only to "suits of a civil nature . . . ." Fed. R. Civ.

P. 1. There is no authority recognizing a right of intervention in a criminal trial. Any interest appellants may have in property subject to forfeiture may be protected in a civil action to quiet title.

THE CONVICTION - 81-1727.

Murillo does not challenge the sufficiency of the evidence. Instead he challenges various rulings by the district court and argues that their cumulative effect was to deny him a fair trial. We have examined each of the numerous allegations of error and find them all to be without merit.

We reject the argument that Murillo was prejudiced by preindictment delay. There was no bad faith or lack of diligence by the government in commencing the proceedings. The delay in bringing the indictment was attributable largely to the complexity and continuing nature of the scheme being investigated, not to lack of diligence. *See United States v. Lovasco*, 431 U.S. 783, 796 (1979). Nor has Murillo demonstrated specific prejudice resulting from the delay. Vague references to the loss of numerous key witnesses and fading memories of others are not sufficient. "A defendant must identify the witnesses, relate the substance of their testimony and efforts made to locate them." *United States v. Mills*, 641 F.2d 785, 788 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981). There is no basis for attacking the proceedings below on grounds of delay. *United States v. Mays*, 549 F.2d 670, 674-78 (9th Cir. 1977).

Murillo's argument concerning the deportation of potential witnesses suffers from much the same defect as his preindictment delay argument. Apart from conclusory statements to the effect that the witnesses would have aided in the cross-examination of government witnesses, he offers no explanation of what the witnesses would have said if available. Although Murillo could not be expected to render

a detailed description of the lost testimony, some showing of materiality is required. *United States v. Valenzuela-Bernal*, ___ U.S. ___, 102 S.Ct. 3440, 3444, 3449 (1982).

The contention based on destruction of evidence is also without merit. There was no evidence of bad faith in this case. The government destroyed the heroin, which was seized in connection with prior cases, as a routine matter. *See United States v. Loud Hawk*, 628 F.2d 1139 (9th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 917 (1980). Nor was Murillo prejudiced by his inability to conduct his own test of the chemical makeup of the seized substances. He was able to question the chemist who performed the test as to the correctness and reliability of the procedures followed and to challenge the accuracy of the results. *See United States v. Ortiz*, 603 F.2d 76, 80 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980).

The trial court's refusal to hold a preliminary hearing on the admissibility of statements made by alleged co-conspirators was not error. *See, e.g., United States v. Zemek*, 634 F.2d 1159, 1169 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

The admission of the handwritten telephone directory seized from one of Murillo's residences was not error. The search for firearms and instruments of title to firearms was conducted pursuant to a valid search warrant. *See United States v. Banks*, 539 F.2d 14, 17 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976). The officers were legally in a position to see the directory. They were justified in searching it to see if it contained papers indicating control or ownership of firearms. Its incriminating nature was immediately apparent to the DEA agents who discovered it. *United States v. Wright*, 667 F.2d 793 (9th Cir. 1982), is distinguishable because in that case the searching officer showed the ledger to a DEA agent after he had satisfied himself that it did not

contain the driver's license he was searching for. *Id.* at 799. The search and subsequent seizure in this case were legal. *See United States v. Hillyard*, 677 F.2d 1336, 1341-42 (9th Cir. 1982).

The fact that Murillo was charged with a single conspiracy is irrelevant in light of his conviction under 21 U.S.C. § 846. Even if he had taken part in separate conspiracies, evidence of their existence would have been admissible as part of the government's proof under § 846. If separate conspiracies wre proved, the admissions of coconspirators would still have been admissible against Murillo because he would have been a member of each. Any error was harmless.

We have carefully examined each of Murillo's additional claims of error and find them to be without merit. Inasmuch as the actions complained of were not error, their cumulative effect did not deny Murillo a fair trial.

AFFIRMED.

APPENDIX 2.

Opinion.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellant, vs. Catarino Murillo, Defendant-Appellee. CA No. 82-1043. DC No. CR 81-363-1.

Filed: July 6, 1983.

Appeal from the United States District Court for the Central District of California.

Honorable William P. Gray, District Judge, Presiding.

Argued and submitted January 3, 1983.

Before: SKOPIL, NELSON and CANBY, Circuit Judges.

CANBY, Circuit Judge:

This appeal is one of three spawned by the heroin distribution prosecution of Catarino Murillo. In an unpublished memorandum, Nos. 81-1727 and 82-5304, we affirmed Murillo's conviction and the district court's denial of a motion to intervene filed on behalf of Murillo's minor children. In this appeal the government challenges the district court's order exempting certain property from the jury's special forfeiture verdict under 21 U.S.C. § 848. We reverse.

Prior to 1976, Murillo was a spray painter earning approximately $4.50 per hour. He lived in lower middle income housing and experienced financial difficulties. In 1976, he borrowed money from his relatives and bought the Los Arcos bar for approximately $6,000. Although Murillo's tax returns indicated that the bar was not profitable, (in 1979, he reported a net loss of $27.49) and that his taxable income was declining, his lifestyle improved drastically. By 1979, Murillo had approximately $1,200,000 in Mexican bank accounts and owned several valuable pieces of property in Southern California. He also owned several vehicles and

various other luxury goods. Most of these items were purchased with cash. Murillo's total cash expenditures in the United States during the years 1977-1979 were in excess of $1,000,000.

The government attempted to prove that Murillo financed his new lifestyle by running a heroin distribution network. The government's evidence established that Murillo imported large quantities of heroin from Mexico and supervised its distribution in this country.

On October 14, 1981, following a four-week jury trial, Murillo was convicted of, among other things, supervising a continuing criminal heroin enterprise in violation of 21 U.S.C. § 848. That conviction required the jury to deliberate further regarding the criminal forfeiture of properties purchased by Murillo. (See 21 U.S.C. § 848(a)(2).[1] On October 15, the jury returned special forfeiture verdicts for all the properties listed in the indictment. These properties included five parcels of real property and four vehicles which the jury found to have been purchased with profits from Murillo's continuing criminal enterprises.

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[1]21 U.S.C. § 848(a) provides:

(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States —

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Murillo was sentenced on December 7, 1981. At that time, the district court declined to follow the jury's special forfeiture verdicts as to one of Murillo's houses and one of his cars. The government filed a motion under Rule 35 of the Federal Rules of Criminal Procedure to correct an illegal sentence. It argued that the trial court had no authority to exempt properties forfeited by the jury under 21 U.S.C. § 848. The trial court denied that motion and the government appealed. Our jurisdiction is based on 18 U.S.C. § 3731 (1976). *See United States v. Godoy*, 678 F.2d 84, 87 (9th Cir. 1982), *appeal filed* 82-538 (Sept. 27, 1982).

Murillo does not argue that the district court had discretion generally to exempt property from forfeiture. Although the issue is apparently one of first impression under 21 U.S.C. § 848, this court recently held that the district court has no such discretion in a forfeiture pursuant to 18 U.S.C. § 1962 (1976) (RICO). *United States v. Godoy*, 678 F.2d 84 (9th Cir. 1982), *appeal filed* 82-538 (Sept. 27, 1982). In *Godoy*, we adopted the Fifth Circuit's rationale in *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980), and held that the RICO forfeiture provision was mandatory.

The language of the two forfeiture provisions, which were enacted by the same Congress, is almost identical. Each plainly requires mandatory forfeiture. Section 848(a)(1) provides that anyone engaged "in a continuing criminal enterprise *shall be sentenced* [to a minimum of ten years] imprisonment, to a fine of not more than $100,000, *and* to the forfeiture prescribed in paragraph (2)." (emphasis added). Section 848(a)(2) repeats the mandatory language of paragraph one.[1] In short, the *L'Hoste* analysis adopted in *Godoy* and applied to forfeitures under 18 U.S.C. § 1963 is equally applicable to forfeitures under 21 U.S.C. § 848. Both provisions are mandatory and leave no discretion in the district court.

Murillo argues that notwithstanding the mandatory nature of § 848, the district court had the power to set aside the jury's verdict pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. He contends that the trial judge properly exercised that power to protect the interest of a third party, Antonia Vizcaara, whom Murillo alleges to be the legal title holder to the house in question.

There is nothing in the record even to suggest that the trial court was aware of or concerned with the interests of third parties when it set aside the forfeiture verdict.[2] Nor did it purport to overturn the jury's finding on the basis that there was no evidence to support it. The district judge, acting without the benefit of the decision in *Godoy*, simply exempted the two items from forfeiture in the belief that it was within his discretion to do so.

The district court lacked the power to decline to order the forfeiture of the two properties in question. Insofar as it failed to order such forfeiture, the district court's judgment was an illegal sentence which should have been corrected pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure. The district court's denial of Rule 35(a) motion is therefore reversed and the case is remanded for correction of judgment under Rule 35(a).

REVERSED AND REMANDED.

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[2]In any event, criminal forfeiture under § 848 operates *in personam* against the convicted defendant. *United States v. Long*, 654 F.2d 911 (3d Cir. 1981). The interest of one who received the property from the defendant with knowledge of the government's claim may be adversely affected, however, *Id.* at 916-17.

APPENDIX 3.

Order.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellant, vs. Catarino Murillo, Defendant-Appellee. No. 82-1043.

Filed: August 29, 1983.

Before: JUDGES SKOPIL, NELSON, and CANBY, Circuit Judges.

The petition for rehearing is denied.

APPENDIX 4.

Notice of Appeal.

United States District Court, Central District of California.

United States of America, Plaintiff/Appellee, vs. Catarino Murillo, Defendant/Appellant. CR-81-363-WPG. No: 81-1727.

Filed: September 29, 1983.

DEFENDANT/APPELLANT, CATARINO MURILLO hereby appeals to the United States Surpeme Court from a judgment of conviction and resulting sentence rendered in United States District Court-Central District of California on December 7, 1983; affirmance of said conviction rendered by The United States Court of Appeals-Ninth Circuit and subsequent denial on rehearing by same Court on August 29, 1983.

DATED: Sept. 26, 1983.

/s/ Roger Agajanian
ROGER AGAJANIAN
Attorney for Catarino Murillo

No. 83-1112

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

CATARINO MURILLO,

Defendant and Appellant.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

SUPPLEMENTAL BRIEF.

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No. 83-1112

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

CATARINO MURILLO,

Defendant and Appellant.

SUPPLEMENTAL BRIEF.

Petitioner, respectfully requests that the recent changes in the law by United States Supreme Court case law be included with Petitioner's original Petition for Writ of Certiorari as it relates to Issue III.

Petitioner twice moved to dismiss the criminal charges involving distribution of heroin (CT 1-5) in the District Court. The motions were based primarily on the controlling decision in the circuit at the time, *United States v. Mendez-Rodriguez*, 450 F.2d 1 (1971). Petitioner believes the trial record in the case clearly establishes a violation of the then-controlling rule. However, after the trial but before the Circuit court heard the Appeal, this Court's decision in *United States v. Valenzuela-Bernal*, ___ U.S. ___, 102 S.Ct. 3440 voided the Ninth Circuit's earlier decision. On the Appeal, the Circuit court ruled Petitioner failed to prove that the deported witnesses had material, favorable evidence to give and rejected Petitioner's argument.

Petitioner contends that in fact the record does show the required prejudice and that if it does not, he is entitled to have an opportunity to prove the materiality and favorable nature of deported witnesses' testimony.

Prejudice.

The record shows the seven (7) witnesses were deported at a time the government knew or should have known they were percipient witnesses. One was an alleged co-defendant in Count II of this indictment. Others were directly involved in the transactions alleged as overt acts in the conspiracy (Count I). The record in this case shows Petitioner was a suspect for over six (6) years before he was indicted. During that time the government prosecuted or employed or interviewed or surveilled all seven (7) of the deported witnesses plus two (2) other persons, Simon Meza and Ramon Ochoa. These last two became government witnesses, implicating defendant and the other seven. Petitioner contends that the records support a reasonable inference that the government selected the two out of nine possible witnesses and sent the other seven to Mexico. These seven would not give evidence favorable to the government or else they too would have been enlisted as government witnesses in return for some barter or deal (as were the two who did testify). The inference is inescapable that here the deported witnesses would have (a) had material evidence (since they are percipient witnesses to the events critical to the government's cars) and (b) the evidence would not have been favorable to the government. If even one witness fits this conclusion, Petitioner contends the prejudice requirement of *Valenzuela-Bernal* has been met.

Remand.

This Court has suggested in *Valenzuela-Bernal, supra*, that the *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342, test for motions for new trials is appropriate

for evaluating deportation due process claims.

Petitioner contends he is at least entitled to have his case remanded for the purpose of offering additional evidence of the specific nature of the favorable material evidence which the deported witnesses could have given if not deported. Their opportunity would enable the trial Court to consider the evidence in the case and weigh the prejudice to Petitioner. Moreover, Petitioner has never had such an opportunity since at all times before the Appeal, Petitioner, his Counsel and the United States Attorney relied on *Mendez-Rodriguez* which had been the law in the Circuit for ten (10) years at the time.

Petitioner contends that since the government's entire case (on CT 1-5) rests exclusively on the testimony of two witnesses who themselves were either paid informants, convicted felons or both, it is probable that his motion for a new trial and for dismissal will be granted if he is permitted to offer evidence to prove the government deported witnesses who could give material favorable evidence as required by *United States v. Valenzuela-Bernal, supra*, and the subsequent decisions of the Ninth Circuit implementing that holding, *United States v. Marguey*.

Dated: January 27, 1984.

Respectfully submitted,

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